SAID DHARMALINGAM ABDULLAH

v.

MALAYAN BREWERIES (MALAYA) SDN. BHD.

SUPREME COURT, KUALA LUMPUR
EDGAR JOSEPH JR. FCJ
MOHAMED DZAIDDIN FCJ
ABU MANSOR ALI JCA
[CIVIL APPEAL NO: 02-470 OF 1993]
15 NOVEMBER 1996

ADMINISTRATIVE LAW: *Dismissal - Dismissal of a workman - Whether void - Denial of right to make a plea in mitigation before dismissal - Whether a breach of rules of natural justice - Audi alteram partem - Whether encompassing right to mitigate.*

ADMINISTRATIVE LAW: *Dismissal - Dismissal of a workman - Statutory safeguards - Requirement of* ***due inquiry*** *- Section 14(1) Employment Act 1955 - Non-compliance - Legal effect - Whether dismissal void - Whether of no effect when misconduct was of a serious nature.*

WORDS & PHRASES: *"Due inquiry" - Section 14(1) Employment Act 1955.*

The appellant was employed by the respondent ('the Employer') as a wort cooler operator at its brewery in Kuala Lumpur, and was a workman under the Employment Act 1955 ('the Act'). The employer alleged that the appellant had committed attempted theft within the premises of the brewery, and so held a domestic enquiry to enquire into the alleged misconduct. The enquiry panel found the appellant guilty of four charges, including attempted theft, and recommended dismissal forthwith. The recommendation was acted upon by the brewery manager and the appellant, as a result, was dismissed from service.

The appellant took a writ action against the employer claiming that the dismissal was in breach of the rules of natural justice. It was not in dispute that both the enquiry panel and the brewery manager, in recommending the dismissal and dismissing the appellant respectively, had not heard any mitigation on the part of the appellant. This being the case, the appellant contended that the dismissal was void as the requirement of **"due inquiry"** in s. 14(1) of the Act had not been complied with. The learned Judge held that the employer had done all that was necessary to ensure a fair hearing at the enquiry, and so there was no breach of the principles of natural justice. The appellant appealed, and before the Supreme Court the primary question that arose was whether a contractual servant who is an "employee" within the meaning of

the Employment Act 1955, would be entitled to have his dismissal declared null, void and of no effect, if procedural safeguards provided by the Law have not been observed at a pre-dismissal inquiry at the domestic level.

Held:

Per Edgar Joseph Jr. FCJ (delivering the judgment of the Court):

[1] Generally speaking, where the relationship is that of master and servant, the applicable law is that of the common law of contract, and the principles of administrative law, which must include the fundamental rule of natural justice expressed in the maxim *audi alteram partem*, would not apply. However, where the employment is in the public sector, or where statutory or other protection is conferred, procedural safeguards will have to be observed. Thus, whilst this was a case of a master and servant relationship, the crucial question to ask is whether a statutory or other requirement provides or can be interpreted as providing the elementary safeguard of the right to a hearing.

[2] In the present case, there is a statutory requirement, to wit, s. 14(1) of the Act, providing for the elementary safeguard of the right to "due inquiry" by the employer. **Due inquiry** for purposes of s. 14 includes the right to make representations against the punishment proposed as a result of adverse findings by a domestic body. It follows that *prima facie*, a dismissal in breach of s. 14(1) would be void.

[3] The cases of *Dreamland Corporation (M) Sdn. Bhd. v. Choong Chin Sooi & Anor*. and *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd.* which held that failure by an employee to hold a pre-dismissal enquiry is curable by the hearing before the Industrial Court, ought to be distinguished on the facts. *Dreamland* and *Wong Yuen Hock* were cases where it was **not** open to the workman to rely on a statutory or other requirement which provided or could be interpreted as providing the elementary safeguard of the right to a hearing.

[4] When, as here, a claimant is an employee within the meaning of the Act, he has by s. 14(1) thereof, a statutory right to **due inquiry** by his employer. This being the case, the approach of the Industrial Court or for that matter the High Court, in considering the question whether the claimant had been dismissed without just cause or excuse, would be to examine the decision not just for substance but for process as well.

[5] Speaking generally, it is a tenable proposition that, where misconduct has been proven, different employers might react differently. However, different considerations will arise if statutory or contractual provisions

require in clear terms that a specified punishment is to be mandatory sequel upon proof of a given state of affairs. In such a situation, denial of an opportunity to be heard would seem to occasion no prejudice to the affected party since the employer would have no discretion but to dismiss. The same considerations should apply if the misconduct alleged is by its very nature so grave as to be obviously unpardonable.

[6] There was a partial denial of the appellant's right to **due inquiry** when he was denied the opportunity to make a plea in mitigation before the domestic body herein. The misconduct proved against the employee, however, was very grave, involving as it did the element of dishonesty and a high degree of premeditation and preparation. The appellant must therefore have been aware, that in the event of an adverse finding on the issue of liability, dismissal would be a mandatory sequel. Indeed, no other punishment was possible given the circumstances of the case. It follows that it would have been a useless formality to have accorded the appellant the right to make a plea in mitigation as the penalty would have been the same even if that right had been exercised.

[Appeal dismissed. No order as to costs.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG PENTADBIRAN: *Pemecatan - Pemecatan seorang pekerja - Samada tak sah - Penafian hak untuk membuat rayuan meringankan hukuman sebelum pemecatan - Samada suatu kemungkiran kaedah-kaedah keadilan asasi - Audi alteram partem - Samada merangkumi hak merayu untuk keringanan hukuman.*

UNDANG-UNDANG PENTADBIRAN: *Pemecatan - Pemecatan seorang pekerja - Perlindungan statutori - Kehendak **siasatan yang wajar** - Seksyen 14(1) Akta Pekerjaan 1955 - Ketidakpatuhan - Kesan undang-undang - Samada pemecatan tak sah - Samada tidak mempunyai kesan apabila perbuatan salahlaku bersifat serius.*

PERKATAAN DAN ISTILAH: *"Due Inquiry" - Seksyen 14(1) Akta Pekerjaan 1955.*

Perayu telah diambil bekerja oleh responden (Majikan) sebagai pengendali 'wort cooler' di kilang bir nya di Kuala Lumpur, dan merupakan seorang pekerja di bawah Akta Pekerjaan 1955 (Akta). Majikan telah mendakwa bahawa perayu telah melakukan kesalahan cuba mencuri dalam premis kilang bir itu, dan dengan itu telah mengadakan satu siasatan domestik bagi menyiasat salah laku yang dikatakan itu. Panel siasatan mendapati perayu bersalah atas empat tuduhan

termasuk percubaan mencuri, dan mengesyorkan pemecatan segera. Syor itu telah diterimapakai oleh brewery manager dan perayu, akibatnya, telah dipecat daripada perkhidmatan.

Perayu telah memulakan tindakan writ terhadap Majikan menuntut bahawa pemecatannya itu telah melanggari kaedah-kaedah keadilan asasi. Ianya tidak dipertikaikan bahawa kedua-duanya panel siasatan dan brewery manager, dalam mengesyorkan pemecatan dan memecat perayu, masing-masingnya tidak mendengar rayuan oleh perayu untuk mengurangkan hukuman. Oleh kerana keadaannya sedemikian, perayu menegaskan bahawa pemecatan itu tak sah kerana kehendak "due inquiry" dalam s. 14(1) Akta telah tidak dipatuhi. Hakim yang bijaksana telah memutuskan bahawa majikan tersebut telah melakukan kesemua yang diperlukan untuk memastikan satu perbicaraan yang adil ketika siasatan tersebut, dan oleh itu tidak berlaku kemungkiran akan prinsip-prinsip keadilan asasi. Perayu telah merayu, dan di hadapan Mahkamah Agung persoalan utama yang berbangkit adalah samada seorang pengkhidmat kontraktual yang merupakan "pekerja" dalam maksud Akta Pekerjaan 1955, akan berhak untuk mengisytiharkan pemecatannya sebagai batal, tak sah dan tidak berkesan jika prosedur perlindungan yang diperuntukkan oleh undang-undang telah tidak dipatuhi di satu siasatan pra-pemecatan di peringkat domestik.

Diputuskan:

Oleh Edgar Joseph Jr. HMP (menyampaikan penghakiman Mahkamah):

[1] Secara umumnya, di mana perhubungan yang wujud adalah di antara majikan dan pengkhidmat, undang-undang yang terpakai adalah undang-undang common law bagi kontrak, dan prinsip undang-undang pentadbiran, yang mana mestilah termasuk kaedah asasi keadilan yang dinyatakan dalam *maxim audi alteram partem*, tidak terpakai. Walaubagaimanapun, di mana pekerjaan itu adalah dalam sektor awam, atau di mana perlindungan statutori atau yang lain dianugerah, prosedur perlindungan haruslah dipatuhi. Oleh itu, sementara ini merupakan satu kes antara majikan dan pengkhidmat, persoalan penting untuk dipersoalkan adalah samada kehendak statutori atau kehendak yang lain ada memperuntukkan atau boleh ditafsirkan sebagai telah memberikan perlindungan asas bagi hak untuk perbicaraan.

[2] Dalam kes semasa ini, terdapat kehendak statutori, iaitu s. 14(1) Akta, yang memberikan perlindungan asas hak kepada "due inquiry" oleh majikan. Due inquiry bagi tujuan s. 14 termasuk hak untuk membuat representasi terhadap hukuman yang dicadangkan akibat suatu keputusan yang memudaratkan yang dibuat oleh sebuah badan domestik. Ianya mengikut bahawa *prima facie*, suatu pemecatan yang melanggari s. 14(1) akan menjadi tak sah.

[3] Kes-kes *Dreamland Corporation (M) Sdn. Bhd. v. Choong Chin Sooi & Anor. dan Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd.*, yang memutuskan bahawa kegagalan oleh seorang pekerja untuk mengadakan satu siasatan pra-pemecatan boleh dipulihkan oleh perbicaraan di hadapan Mahkamah Perindustrian, seharusnya diperbezakan berdasarkan fakta-fakta. *Dreamland* dan *Wong Yuen Hock* merupakan kes-kes di mana ianya **tidak** terbuka kepada pekerja untuk bergantung kepada kehendak statutori atau yang lain yang memperuntukkan atau boleh ditafsirkan sebagai memberikan perlindungan asas hak kepada satu perbicaraan.

[4] Apabila, sepertimana keadaannya di sini, seseorang pihak menuntut itu merupakan pekerja dalam maksud Akta, beliau mempunyai melalui s. 14(1) di sini, satu hak statutori untuk **due inquiry** oleh majikannya. Oleh kerana keadaan sedemikian, pendekatan Mahkamah Perindustrian atau pun Mahkamah Tinggi, dalam mempertimbangkan persoalan samada penuntut itu telah dipecat tanpa kausa yang adil atau alasan, adalah untuk memeriksa keputusan bukan sahaja bagi substans tetapi untuk proses juga.

[5] Secara amnya, ianya adalah proposisi yang boleh dipertahankan bahawa, di mana salah-laku telah terbukti, majikan yang berlainan mungkin akan bertindak secara yang berbeza. Walauapapun, pertimbangan yang berbeza akan berbangkit jika peruntukan-peruntukan statutori atau kontraktual menghendaki dengan jelas bahawa sesuatu hukuman yang spesifik haruslah menjadi ekoran mandatori setelah terbukti kedudukan sesuatu perkara. Dalam situasi yang sedemikian, penafian suatu peluang untuk didengar tidak akan menyebabkan kemudaratan kepada pihak yang terjejas oleh kerana majikan tidak mempunyai budicara lain selain daripada memecat. Pertimbangan yang sama seharusnya terpakai jika salah-laku yang didakwa itu bersifat sangat berat sehingga ketara tidak boleh diampuni.

[6] Memang berlaku sedikit penafian kepada hak perayu untuk **due inquiry** apabila beliau dinafikan peluang untuk membuat rayuan bagi mengurangkan hukuman di hadapan badan domestik di sini. Salah-laku yang telah terbukti terhadap pekerja, namun begitu, adalah sangat berat dan melibatkan unsur ketidak-jujuran dan tahap perancangan serta penyediaan terdahulu yang tinggi. Perayu dengan itu tentu sekali telah mengetahui, bahawa sekiranya terdapat pendapat bersalah atas isu liabiliti, pemecatan akan menjadi sesuatu yang mandatori. Sesungguhnya, tidak ada hukuman lain yang mungkin boleh diberikan dalam keadaan kes ini. Ianya mengikut bahawa ianya merupakan suatu formaliti yang tidak berguna bagi memberikan perayu hak untuk membuat rayuan untuk mengurangkan hukuman kerana penaltinya adalah sama walaupun hak itu telah dilaksanakan.

[Rayuan ditolak. Tiada perintah bagi kos.]

Cases referred to:
Ridge v. Baldwin [1964] AC 40 ***(refd)***
Nakkuda Ali v. Jayaratne [1951] AC 66 ***(refd)***
Malloch v. Aberdeen Corporation [1971] 1 WLR 1578 ***(refd)***
Vidyodaya University of Ceylon v. Silva [1964] 3 All ER 865 ***(cit)***
Chief Constable of North Wales v. Evans [1983] 1 WLR 141 ***(refd)***
Stevenson v. United Road Transport Union [1977] 2 All ER 941 CA ***(refd)***
Yates v. Lancashire County Council [1974] 10 ITR 20 EAT ***(refd)***
Breen v. Amalgamated Engineering Union [1971] 2 QB 175 ***(refd)***
102 Social Club & Institute Ltd. v. Bickerton [1977] ICR 911 ***(refd)***
Khanum v. Mid Glamorgan Area Health Authority [1970] ICR 911 EAT ***(refd)***
R v. BBC, ex parte Lavelle [1982] 1 RLR 404 ***(refd)***
Dreamland Corporation (M) Sdn. Bhd. v. Choong Chin Sooi & Anor. [1988] 1 MLJ 111 ***(dist)***
Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. [1995] 3 CLJ 344 ***(dist)***
Siggs & Chapman (Contractors) v. Knight [1984] IRLR 83 ***(foll)***
British Leyland UK Ltd. v. Swift [1981] IRLR 91 ***(refd)***
General Medical Council v. Speckman [1943] AC 627 ***(refd)***
Glynn v. Keele University [1971] 2 All ER 89 ***(refd)***
Ward v. Bradford Corporation [1972] 70 LGR 27 ***(refd)***

Legislation referred to:
Employment Act 1955, s. 14(1)
Industrial Relations Act 1967, s. 30(5A)
Municipal Corporations Act 1882, s. 191(4)

Other sources referred to:
Procedural Fairness in Dismissal Proceedings in Malaysia, Mr. V. Anantaraman, [1996] 2 MLJ cxiii
Code of Conduct of Industrial Harmony, Art. 42

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R2-22-11-90]

For the appellant - Karpal Singh (Jagdeep Singh Deo with him); M/s. Karpal Singh & Co.
For the respondent - P. Nallini; M/s. Skrine & Co.

JUDGMENT

Edgar Joseph Jr. FCJ:

In this judgment it would be more convenient if we referred to the appellant and the respondent as 'the Employee' and 'the Employer', respectively.

The essential facts may be shortly stated and are these:

The Employee had been employed by the Employer as a wort cooler operator at its brewery situated at Jalan Foss, Kuala Lumpur.

By a letter dated 21 October 1988, the Employee had been suspended from duties for a period of two weeks pending investigations into an allegation that he had on 15 October 1988 at about 3.30a.m. at the Employer's brewery compound committed the offence of attempted theft of 30 bottles of Fraser & Neave cordials and one bottle of Lion Stout. A police report was lodged at 6.40 a.m. the same day by the Employer's head guard who alleged that he was an eye witness to the offences charged. Some three weeks later, the Employee had been given formal notice by letter dated 31 October 1988, signed by the Employer's personnel officer Lim Fah, that it had decided to hold a domestic enquiry to consider four charges against him, particulars whereof were set out in a charge sheet annexed thereto, and which were in the following terms:

1. That on 15 October 1988 at about 4.07a.m. you have attempted to steal 30 bottles of F & N cordials and one bottle of Lion Stout pint out of Brewery compound by means of your car WAQ 213.

2. That on 15 October 1988 at about 4.07a.m. you have resisted security check by the guard by driving your car WAQ 213 away from the barrier gate, thus, obstructing the security guards from doing their duty.

3. That on 15 October 1988 at about 4.08a.m. you have wilfully driven your car WAQ 213 into area 'prohibited for private motor vehicles after 7p.m., i.e. from Water Tank to conwaste Bins area.

4. That on 15 October 1988, you were missing from workplace from about 4.17a.m. to 4.43a.m. without the permission of your superior.

The letter dated 31 October 1988 had warned the Employee that he was required to be present at the domestic enquiry which was to be held on 4 November 1988 at 9a.m. at the personnel officer's office and that he should bring along with him such documentary evidence and witnesses who might assist him in his defence, and that he could be assisted by a union representative.

On the appointed date, the hearing of the domestic enquiry commenced, ending three days later. Charged with him was his colleague one Appalasamy. The Employee did attend the domestic enquiry and was assisted by a union representative, Jaffar. He pleaded "not guilty" to all the charges.

The Panel of Enquiry ('the Panel') comprised four senior executives of the Employer. The prosecuting officer was the personnel officer Lim Fah. A number of witnesses were called by the prosecuting officer including the Employer's head guard Saadon bin Hj. Ahmad, security guard Ab. Ghany bin Harun and foreman Jalil bin Tahir, who said they were at the scene of the

attempted theft at the material time, in the course of duty. The testimony of these witnesses seriously incriminated the employee. Each of them was cross-examined by the Employee. There was thus ocular proof that the Employee had a case to answer on each of the charges aforesaid.

Upon his defence being called, the Employee gave his version of the facts. He alleged that the case against him had been framed because of "unhappy incidents" involving himself on the one hand and the head guard Saadon and the security guard Ab. Ghany, on the other. He did not however suggest why the foreman Jalil should falsely implicate him.

In the event, the Panel had found the Employee guilty of all charges.

According to the applicable domestic procedure, the Panel was the decision making body only insofar as the issue of liability was concerned.

So far as the issue of penalties was concerned, under the applicable domestic procedure, the Panel had only powers to make recommendations to the Brewery Manager Mr. J.H. Mameren who alone had the power to impose the appropriate penalty, no doubt after taking into consideration such recommendations, without regarding them as being in any way binding.

In the event, the Panel, without inviting the Employee to make a plea in mitigation, recommended that he be dismissed with immediate effect, in view of the gravity of the offences of which he had been found guilty, particularly, the offence of attempted theft. It remarked, in passing, "no other recommendation is required." In the case of the Employee's co-accused Appalasamy, the Panel recommended a period of suspension without pay.

Thereafter, the Brewery Manager, without inviting the Employee to make a plea in mitigation, dismissed him with immediate effect by a letter dated 16 November 1988 which was in the following terms:

> sl/608/88
>
> 16 November 1988
>
> Mr. Dharmalingam Ranganathan
> Pay No. 238
>
> Dear Sir,
>
> DISMISSAL
>
> We refer to the Domestic Inquiry held on 4 November 1988. We concur with the findings of the panel of inquiry which finds you guilty of committing the following charges:

1. That on 15 October 1988 at about 4.07a.m. you have attempted to steal 30 bottles of F & N cordials and one bottle of Lion Stout pint out of Brewery compound by means of your car WAQ 213.

2. That on 15 October 1988 at about 4.07a.m. you have resisted security check by the guard by driving your car WAQ 213 away from the barrier gate, thus, obstructing the security guards from doing their duty.

3. That on 15 October 1988 at about 4.08a.m. you have wilfully driven your car WAQ 213 into area 'prohibited for private motor vehicles after 7p.m., i.e. from Water Tank to conwaste Bins area.

4. That on 15 October 1988, you were missing from workplace from about 4.17a.m. to 4.43a.m. without the permission of your superior.

The charges proved against you at the inquiry being of a very serious nature, the punishment warranted is that of dismissal.

The company has therefore decided to dismiss you from service accordingly with effect from the date of this letter.

Any monies due to you well be released upon obtaining clearance from the Income Tax Department in accordance with the provision of s. 83(5) of the Income Tax Act 1967.

Kindly arrange to return all properties belonging to the company.

Your faithfully,
MALAYAN BREWERIES (M) SDN BHD.

Sgd.

(J.H. Van Mameren)
Brewery Manager.

In the event, the Employee caused to be issued in the High Court, Kuala Lumpur (appellate and Special Powers Division) against the Employer, a writ claiming, *inter alia,* a declaration that his dismissal from service as a Wort Cooler Operator was in breach of the rules of natural justice.

However, at the conclusion of the hearing the learned Judge held that the Employer had done all that was necessary to ensure a fair hearing at the enquiry and that therefore there was no breach of the principles of natural justice. His Lordship therefore dismissed the action with costs.

Broadly stated, before us, the dominant question of law which arises for decision in this appeal is whether a contractual servant who is an 'employee' within the meaning of the Employment Act 1955, would be entitled to have his dismissal declared null, void and of no effect, if procedural safeguards provided by the law have not been observed at a pre-dismissal inquiry at the domestic level?

Speaking generally, where the relationship is that of master and servant, we are normally in the field of the Common Law of contract, and so, the principles of administrative law, which, of course, must include the fundamental rule of natural justice expressed in the Latin maxim *audi alteram partem* (hear the other side) would not apply. On the other hand, where the employment is in the public sector, or where statutory or other protection is conferred, procedural safeguards will have to be observed.

And, so far as remedies are concerned, at Common Law, in an ordinary master and servant relationship, where wrongful dismissal is established, relief will not be by way of an order for reinstatement but by way of an award of damages.

In *Ridge v. Baldwin* [1964] AC 40, the Chief Constable, Brighton, Ridge had been tried for conspiring to corrupt the course of justice but was acquitted. Thereafter, arising out of certain derogatory remarks passed by the trial Judge against Ridge, when acquitting after a lengthy trial, the Watch Committee acting under s. 191(4) of the Municipal Corporations Act 1882, which empowered them to dismiss any constable "whom they think negligent in the exercise of their duty", dismissed him from his office. Ridge was not present at their meeting nor was he given notice of the proposal to dismiss him, particulars of the grounds on which it was based, or an opportunity of stating his case. The Court of Appeal, relying on the Privy Council case of *Nakkuda Ali v. Jayaratne* [1951] AC 66 held that the Committee was only acting in an administrative capacity, but on further appeal to the House of Lords, their Lordships of the House disagreed. Their Lordships of the House concluded that as the Committee had not observed the rules of natural justice its decision was void.

In referring to the right to be heard before being dismissed, Lord Reid distinguished three types of cases; namely, (i) dismissal of a servant by his master, (ii) dismissal from an office held during pleasure and (iii) dismissal from an office where there must be something against a man to warrant a dismissal.

So far as (i) was concerned, Lord Reid said:

> The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract.

But then he added: "But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants or the grounds on which it can dismiss them."

So far as (ii) is concerned, to say that an office is held during pleasure means that the person empowered to dismiss need not have anything against the officer, so he need not give any reason.

Lord Reid concluded that *Ridge's* case, did not come within (i), as a chief constable is not the servant of any one, nor, for that matter did it fall within (ii) as the statute only permitted the Watch Committee to remove him only on the ground of negligence or unfitness. In the result, *Ridge's* case came within (iii), and in such cases Lord Reid said: "I find an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation."

In *Malloch v. Aberdeen Corporation* [1971] 1 WLR 1578, Malloch, a school teacher had been dismissed from his job, without having been given a hearing. The House of Lords held that if Malloch's status had been governed solely by common law instead of one holding public office during pleasure (Lord Reid's second classification in *Ridge v. Baldwin*), he would not have been entitled to a hearing. However, by a statute of 1882 it was provided that no resolution for the dismissal of such a teacher was to be valid unless notice of motion for his dismissal had been sent to the teacher not less than three weeks before the meeting, and unless the reasolution to dismiss had been agreed to by a majority of all the members of the body concerned. The legal position of Malloch was that his common law position was thus "fortified by statute" and that it was implicit in that provision, that he was entitled to be heard. His dismissal was quashed.

Lord Reid made the observation that an elected public body is in a very different position from that of a private employer. He pointed out that although many of its servants in the lower grade are in the same position as servants of a private employer, "many in higher grades or 'offices' are given special statutory status or protection. The right of a man to be heard in his own defence is the most elementary protection of all and where a statutory form of protection would be less effective if it did not carry with it the right to be heard, I would not find it difficult to imply this right."

Lord Wilberforce while recognising that the principle that a person holding office at pleasure has no right to be heard, was not to be whittled down, added that the right to be heard is so important that that principle should not prevent the Courts from examining the framework of the employment to see whether that right existed.

Indeed, Lord Wilberforce pointed out that even a contractual servant may challenge his dismissal if statutory safeguards are not observed. He said he would not follow *Vidyodaya University of Ceylon v. Silva* [1964] 3 AER

865, (where the Court did not intervene in the dismissal of a professor), insofar as it involved a denial of any remedies of administrative law to analogous employments. His Lordship observed (at p. 1595 G to H):

> A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of the rules of natural justice, according to the master and servant test, looks illogical and even bizarre. A specialist surgeon is denied protection which is given to a hospital doctor; a university professor, as a servant has been denied the right to be heard, a dock labourer and an undergraduate have been granted it: examples can be multipled.

Before us, the decision of the High Court dismissing the Employee's suit was attacked on a number of grounds, but in the end, Counsel for the Employee confined his contention to one ground only; namely, that before the punishment of dismissal was imposed on the Employee, the latter had not been accorded the opportunity of making a submission in mitigation, and that accordingly, there had been a breach of the principle of natural justice expressed in the Latin maxim *audi alteram partem.*

As regards protection against dismissal, office holders and occupants of statutory positions have greater security of tenure, firstly, because the law implies a right to natural justice, and secondly, because a declaration might issue that the dismissal was void. (See, e.g. *Ridge v. Baldwin* [1964] AC 40; *Malloch v. Aberdeen Corporation* [1971] 1 WLR 1578; *Chief Constable of North Wales v. Evans* [1983] 1 WLR 141). Most importantly, in considering the question whether there is a right to a hearing, the crucial question is whether a statutory or other requirement provides or is to be interpreted as providing the elementary safeguard of the right to a hearing. (See, e.g. *Stevenson v. United Road Transport Union* [1977] 2 All ER 941 CA; *Yates v. Lancashire County Council* [1974] 10 ITR 20 EAT (police); *Breen v. Amalgamated Engineering Union* [1971] 2 QB 175 (trade union office holder) *102 Social Club and Institute Ltd. v. Bickerton* [1977] ICR 911 (club)).

A further consideration as regards the question of the right to a hearing under the rules of natural justice or fairness is to be found in the law of unfair dismissal introduced by the Industrial Relations Act 1967. A workman within the Act who has been dismissed may commence proceedings thereunder for the purpose of establishing that he has been unfairly dismissed. In such proceedings, the onus will be on an employer to prove that the dismissal was in all the circumstances reasonable.

The reasonableness of the dismissal may well depend on the procedure followed. In this context, it is pertinent to point out that Art. 42 of the Code of Conduct of Industrial Harmony ('the Code') jointly agreed upon on 9 February 1975, by the Malaysian Council of Employers' Organisation and the Malaysian Trades Union Congress with the approval of the Minister for Labour and manpower,

provides, *inter alia,* for pre-dismissal inquiry with the right to be informed in writing of the misconduct alleged, an opportunity given to the employee to state his case, the right to be represented by his workers' representative or trade union official and where appropriate, a right of appeal.

The resemblance between the requirements of Art. 42 and the requirements of natural justice is striking. It is noteworthy that s. 30(5A) of the Industrial Relations Act 1967, authorises the Industrial Court, in making an award, to take into consideration, the requirements of the Code. However, these requirements are not absolute and so there will be cases where it is clear that there would be no point in observing the pre-dismissal procedure. On the other hand, the case of *Khanum v. Mid Glamorgan Area Health Authority* [1970] ICR 911 EAT (club) shows that where the employer has observed an agreed disciplinary procedure it will be difficult to hold that the dismissal was procedurally unfair.

To return to the submission of Counsel for the Employee before us; he relied heavily on the provisions of s. 14(1) of the Employment Act 1955 ('the Act') which says this:

> 14(1) An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry:
>
> (a) dismiss without notice the employee;
>
> (b) downgrade the employee; or
>
> (c) impose any other lesser punishment as he deems just and fit

As we have already indicated, in the present case, it was common ground that a domestic inquiry had been held, but Counsel stressed that there could be no "due inquiry" within the meaning of s. 14, when, as here, the Employee, a workman within that Act, had been denied the opportunity of addressing in mitigation.

We accept that this was a master and servant relationship case, but as we have already remarked, the crucial question is whether a statutory or other requirement provides or can be interpreted as providing the elementary safeguard of the right to a hearing. As Lord Wilberforce in the case of *Malloch* (*ibid* at p. 1595 H to 1596 A) rightly said:

> One may accept that if there are relationships in which all requirements of the observance of natural justice are excluded (and I do not wish to assume that this is inevitably so), these cases must be confined to what have been called pure master and servant cases, which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the

nature of an office or a status which is capable of protection. If any of these elements exist then, in my opinion, whatever the terminology used, and even though in some *inter partes* aspects the relationship may be called that of master and servant, there may be essential requirements to be observed and failure to observe them may result in a dismissal being declared void.

In *R v. BBC, ex parte Lavelle* [1982] 1 RLR 404, Woolf J indicated, albeit *obiter,* that when there is a procedure for dismissal in an employment not covered by statute at all, employers must comply with that procedure for the dismissal to be valid. If the contractual procedure was infringed, an injunction should issue to prevent the dismissal. This view was partly based on the notion that employment protection legislation had substantially changed the position at common law, so that 'the ordinary contract between master and servant now has many of the attributes of an office.'

In the present case, there is a statutory requirement, to wit, s. 14(1) of the Act, providing for the elementary safeguard of the right to "due inquiry" by the Employer. It follows, that at least, *prima facie,* a dismissal in breach of s. 14(1) would be void.

We are aware of the Supreme Court decision in *Dreamland Corporation (M) Sdn. Bhd. v. Choong Chin Sooi & Anor.* [1988] 1 MLJ 111 which held that failure by an employer to hold a pre-dismissal enquiry could be cured by the hearing before the Industrial Court.

Two points are significant in the *Dreamland* case: first, the Court was considering the case of a workman who was in receipt of income of more than RM1,250 per month and, therefore, **not** employee within the meaning of the Act; secondly, Counsel on both sides had stood on common ground that the dismissal was justified. The only issues for decision were jurisdictional: (1) did the Industrial Court have jurisdiction to award compensation to a workman whose dismissal had been upheld by the Court? and (2) did the Industrial Court have jurisdiction to amend the date of dismissal so that the workman was deemed to be in the employment until the date of the award and thereby become entitled to backwages?

It follows that *Dreamland* was a case where it was **not** open to the workman to rely on a statutory or other requirement which provided or could be interpreted as providing the elementary safeguard of the right to a hearing. Dreamland is, therefore, readily distinguishable on the facts from the present case.

Similarly, the Supreme Court decision in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd.* [1995] 3 CLJ 344 which endorsed *Dreamland,* also concerned an employee in receipt of an income of more than RM1,250

per month and, therefore, not an employee within the meaning of the Act. It was thus not open to him to rely upon the statutory right to a pre-dismissal hearing. *Hong Leong* is, therefore, also readily distinguishable on the facts, from the present case.

We note, in passing, the interesting and well researched article by Mr. V. Anantaraman entitled *"Procedural Fairness in Dismissal Proceedings in Malaysia"* [1996] 2 MLJ cxiii wherein he concludes that "the decisions of the apex Courts both in *Dreamland* and *Hong Leong Assurance* notwithstanding – it may not be far wrong to conclude that the case law governing procedural rectitude in dismissal for misconduct is in a state of flux in Malaysia."

Having said that, we must add, that when, as here, a claimant **is** an employee within the meaning of the Act, he has by s. 14(1) thereof, a statutory right to "due enquiry" by his employer, and so, the approach of the Industrial Court or for that matter the High Court, in considering the question whether the claimant had been dismissed without just cause or excuse, would be, to examine the decision not just for substance but for process as well.

It is not for this Court to speculate what reasons of policy lay behind the decision of Parliament to impose monetary limits as regards salary of a workman to qualify for the right of "due enquiry" under s. 14(1). An obvious consequence of monetary limits would be to give to the poorer and more deserving categories of workmen, in receipt of incomes of less than RM1,250 per month, a statutory safeguard against arbitrary dismissal.

Having decided that the Employee was entitled to the elementary safeguard of the right to a hearing at the domestic proceedings, by reason of s. 14(1) of the Act, we must now direct our attention to the question of critical substance; was there a partial denial of the Employee's right to "due inquiry" when he was denied the opportunity to make a plea in mitigation before the domestic body? In our view there was. The case of *Siggs and Chapman (Contractors) v. Knight* [1984] IRLR 83 shows that an employee should have the opportunity to present arguments not only on "liability" but also in mitigation of penalty.

The next question to be considered is what was the legal effect of the Employee having been denied the right to make a plea in mitigation?

We are prepared to accept, as a tenable proposition that, speaking generally, where misconduct has been proven, different employers might react differently. To quote Acker LJ in *British Leyland UK Ltd. v. Swift* [1981] IRLR 91, 93. "An employer might reasonably take the view, if the circumstances so

justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as special."

We have already said that before the domestic body the Employee faced four charges, which included a charge of attempted theft. The other charges related to offences committed in the course of the alleged attempted theft. There can be no room for doubt that the acts of misconduct alleged against the Employee were of a grave and weighty nature.

Mr. Michael Ong, one of the Panel members, had testified that the punishment of dismissal was in accordance with the Employer's disciplinary sheet, wherein were set out a list of serious offences and attempted theft was such an offence. In the words of Mr. Ong: "We based our recommendation on the Company's disciplinary sheet. Each employee who joined the Company before 1 March 1983 was given a copy of the sheet." The Employee must therefore have been fully aware that if found guilty he would be dismissed and, indeed, the learned trial Judge so found.

In these circumstances, did the fact that the Employee had been denied the opportunity of being heard in mitigation, vitiate his dismissal? In considering this question, we shall now refer to some of the cases which we consider are pertinent.

In *General Medical Council v. Speckman* [1943] AC 627, Lord Wright said: "If the principles of natural justice are violated in respect of any decision, it is immaterial if the same decision would have been arrived at in the absence of the departure from the essential principles of justice." But, this laudable principle has been watered down in later cases, to some of which we shall refer.

In *Ridge v. Baldwin* [1964] AC 40 it was argued that the case against Ridge was so clear that nothing he could have said would have made any difference, that is to say, that what he did warranted dismissal. Lord Reid considered that was a very doubtful excuse, but in any case failed on the facts.

In *Malloch v. Aberdeen Corporation* [1971] 2 All ER 1278, the defendants had contended that the hearing would have been "a useless formality" as they were in any event bound to have dismissed Malloch as he did not possess the qualifications required by law. However, the House of Lords held that was arguable.

On the other hand "the useless formality" argument has prevailed in some cases.

In *Glynn v. Keele University* [1971] 2 All ER 89, where a student had been disciplined the Court held that the failure to give a hearing was a breach of the rules of natural justice, but declined relief on the ground that nothing the student could have said could have affected the disciplinary decision which was, so that Court thought, "intrinsically a perfectly proper one," having regard to the student's behavior.

In *Ward v. Bradford Corporation* [1972] 70 LGR 27, a trainee teacher had permitted a man in her room in the hall of residence, contrary to regulations. There was a hearing which ended in her expulsion. The Court of Appeal conceded that the hearing had been defective in several respects; but declined to intervene. In commenting on the student's behavior, Lord Denning observed: "That is a fine example to set to others .... I expect the governors and staff all thought she was quite an unsuitable person for (teaching). She would never make a teacher."

In the present case, we are not concerned with a flawed decision on the issue of liability, but an impugned pronouncement, as regards punishment only.

We would repeat that "due inquiry" for purposes of s. 14 of the Act, includes the right to make representations against the punishment proposed as a result of adverse findings by a domestic body.

More particularly, we accept that any **discretion** as to punishment to be visited on the affected party in itself should preclude relaxation of the requirement of a fair hearing, which includes being afforded the opportunity to make a plea in mitigation.

It follows that different considerations will arise if statutory or contractual provisions require in clear terms that a specified punishment is to be mandatory sequel upon proof of a given state of affairs. In such a situation, denial of an opportunity to be heard would seem to occasion no prejudice to the affected party since the employer would have no discretion but to dismiss. The same considerations should apply if the misconduct alleged is by its very nature so grave as to be obviously unpardonable. As was well put by Lord Wilberforce in *Malloch* [1971] 1 WLR 1578, 1595 B "The Court does not act in vain."

In the present case, the miscounduct proved against the Employee, was very grave indeed, involving the element of dishonesty and a high degree of premeditation and preparation. The Employee must have been aware, that in the event of an adverse finding on the issue of liability, dismissal would be a mandatory sequel. Indeed, no other punishment was possible, given the circumstances of the case.

It follows, that it would have been a useless formality to have accorded the Employee the right to make a plea in mitigation as the penalty would have been the same even if that right had been exercised.

In the result, we have arrived at the inevitable conclusion that this appeal must be, and is, dismissed.

As much time has been expended in considering questions of law which we had decided in favour of the Employee, although ultimately, on the facts, we have found in favour of the Employer, we make no order as to costs. The deposit paid into Court by way of security for costs must be refunded.

Reported by W.A. Sharif